

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

**WELLS FARGO BANK MINNESOTA,
N.A. AS TRUSTEE and ORIX CAPITAL
MARKETS, LLC,**

Plaintiffs,

V.

MITCHELL KOBERNICK, ALLAN
KLEIN, KENSINGTON CLUB
APARTMENTS, LTD., KENSINGTON
GREEN (MK), INC., and KENSINGTON
GREEN (AK), INC.,

Defendants.

C.A. NO. 8-cv-1458

MEMORANDUM AND ORDER

Before the Court are Plaintiff's Motion for Entry of Final Judgment and Attorney's Fees (Doc. No. 53) and Defendants' Motion to Refer Case to Alternative Dispute Resolution ("ADR") and to Abate Case Pending Completion of Alternative Dispute Resolution (Doc. No. 54) and Supplemental Motion to Refer to ADR (Doc. No. 60). After reviewing the parties' filings, and all responses and replies thereto, the Court finds that Plaintiff's Motion for Entry of Final Judgment and Attorney's Fees should be granted in part and Defendants' Motion to Refer Case to ADR and Supplemental Motion should be denied.

I. Plaintiff's Motion for Final Judgment

Plaintiff contends that its Supplemental Motion for Final Judgment established the amount Defendants owe under the Note, exclusive of taxable costs and attorney's fees, as follows:

Principal \$6,252,451.45
Interest from 2/1/2008 to 2/18/2009 \$474,852.85

at the Contract Rate of 7.12% (384)	
Miscellaneous Expenses	\$69,570.61
Credit for Escrows	(\$75,769.62)
Credit for Suspense	(\$4,476.00)
Keybank advance to be reimbursed by Borrower	54,558.18
Credit for June 2008 Protection Payment	<u>(\$10,000)</u>
TOTAL AMOUNT	\$6,761,187.47

Plaintiff also contends that pre-judgment interest will be due at the following amounts:

Interest from 2/19/2009 to 6/15/2009 at the Contract	
Rate of 7.12% (\$1,236.60 per diem for 117 days)	\$144,682.20
Interest from 2/01/2008 to 6/15/2009 at the Default	
Rate of 3% (\$521.04 per diem for 501 days)	\$261,041.00
Interest accrual from June 15 through August 24, 2009	\$122,828.40

Defendants have not contested these figures; rather, they argue that the amount of indebtedness under the Note has yet to be determined by *Comunidad Kensington's Amended Plan of Reorganization* in the bankruptcy court and its potential claims against Plaintiff in the bankruptcy proceedings. Plaintiff argues, and the Court agrees, that since *Comunidad Kensington* has not assumed the indebtedness and is not personally obligated on the Note, the amount Defendants owe on the Note does not depend on the *Comunidad* bankruptcy proceedings.

II. Defendants' Motion for ADR

Because the parties have mediated the dispute and failed to resolve the outstanding issues, the Court considers Defendants' Motion for ADR to be moot. To the extent it is not, in general, the Court supports parties' attempts to resolve their differences amicably and without judicial assistance. It welcomes the guidance of outside mediators or arbitrators in pursuit of this goal. When the parties do not jointly agree to decide their case using alternative forms of dispute resolution, however, the Court does not compel them. The Court finds no authority, in the

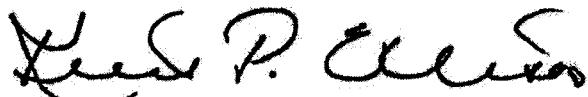
Federal Rules of Civil Procedure or in any federal statute, to require unwilling parties to mediate. Consequently, the Court will deny Defendants' Motion for ADR.

III. Conclusion

Defendants' Motion to Refer Case to Alternative Dispute Resolution ("ADR") and to Abate Case Pending Completion of Alternative Dispute Resolution is **DENIED AS MOOT**. Plaintiff's Motion for Final Judgment is **GRANTED**. Judgment is hereby **ENTERED** for Plaintiff in the amount of **\$7,289,945.47**. Post judgment interest will accrue on the amounts due and unpaid under this judgment at the rate of .44% per annum from this date. The Court will issue a separate judgment to dispose of Plaintiff's claim for attorney's fees.

IT IS SO ORDERED.

SIGNED this 26th day of August, 2009.



KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

**TO ENSURE PROPER NOTICE, EACH PARTY WHO RECEIVES THIS
ORDER SHALL FORWARD A COPY OF IT TO EVERY OTHER PARTY
AND AFFECTED NON-PARTY EVEN THOUGH THEY MAY HAVE BEEN
SENT ONE BY THE COURT.**